APPENDIX A

Opinion of Court of Appeals, Second Circuit, on Affirmance

WATERMAN, *Circuit Judge*:

Plaintiffs, an employer and an insurance carrier, sought to have the district court review and set aside a compensation order and an award of death benefits made pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. Sec. 901 et seq., to the widow of a deceased employee. The Court below granted the defendant Deputy Commissioner's motion for a summary judgment. Plaintiffs bring this appeal, contending, as they did below, that the Deputy Commissioner improperly found an injury arising out of and in the course of employment, 33 U. S. C. Sec. 902(2),[1] occurring upon the navigable waters of the United States, 33 U. S. C. Sec. 903(a).[2]

* * *

John D'Ornellas, the deceased, had been employed for a considerable period of time by McGrath Corporation, a stevedoring concern. On the date of the alleged injury he was working as a sweeper, having been given that job some three or four months previously when it became apparent that his diabetic condition prevented him from working safely as a stevedore. Rose D'Ornellas, widow of the deceased and claimant herein, testified that on either January 13 or 14, 1955 her husband had come home from work looking sick and complaining that he had been ordered to work on a lighter pulling the lighter with a line. He told

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[1] Sec. 902 Definitions. When used in this chapter— * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, * * *.

[2] Sec. 903. Coverage.

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States * * *.

her that following this pulling he suffered great pain in his chest and arm and had to stop work and rest. After staying in bed over the weekend he reported for work on Monday, January 17, and at about 8:45 A. M. on that day he collapsed. He was immediately taken to the hospital where he was found to have suffered a myocardial infarction. He was discharged from the hospital on February 12, 1955, and three weeks later, on March 5, 1955, he died.

In an interview with plaintiff's physician, Dr. Texon, on January 22, 1955, the deceased stated that he first felt the severe pain when he "was pulling a rope to help move a barge around the pier." Substantially the same statement was made by deceased in his claim for compensation dated February 15, 1955. His widow introduced at the hearing a written statement purportedly signed by one Kinnally, a dock boss for McGrath Corporation at the time of the accident, but who had died prior to the hearing, stating that it had been reported to Kinnally by workmen who were there at the time that D'Ornellas "had had a heart attack on a lighter at Pier 9 while he was hauling on a line." In opposition, plaintiffs presented uncontradicted testimony by four of the McGrath Corporation's supervisory employees to the effect that D'Ornellas had been told that he was to confine himself to sweeping and running errands, that he was not to go out on the dock when work was being done there, and that similar orders had been conveyed to the men in charge of the work on the dock. However, George Lucas, McGrath's terminal superintendent, one of these four witnesses, admitted on cross-examination that there was nothing unusual about having a stevedore aboard a lighter pulling a barge.

Claimant's medical expert testified that if the alleged incident occurred it was his opinion that the incident was causally related to the ensuing disability and death. The Deputy Commissioner chose to believe this witness, and since the doctor's testimony was not "so inherently im-

probable that it was unworthy of belief as a matter of law" we do not disturb the Commissioner's finding that there was this causal relation. Gooding v. Willard, 209 F. 2d 913, 916 (2 Cir. 1954). But we must still be satisfied that there was sufficient evidence for the Deputy Commissioner properly to find out the alleged incident truly happened, arising out of and in the course of employment, 33 U. S. C. Sec. 902(2), and occurring not on the dock but upon the navigable waters of the United States, 33 U. S. C. Sec. 903(a); Johnston v. Marshall, 128 F. 2d 13 (9 Cir. 1942), *cert. denied*, 317 U. S. 629 (1942), *rehearing denied*; 318 U. S. 799 (1943); cf. Jeffers v. Foundation Co., 85 F. 2d 24 (2 Cir. 1936).

Sections 7 and 10 of the Administrative Procedure Act, 5 U. S. C. Secs. 1006, 1009, define our scope of review in cases such as this, Gooding v. Willard, 209 F. 2d 913 (2 Cir. 1954); and see O'Leary v. Brown-Pacific Maxon, Inc., 340 U. S. 504 (1951). They provide that no administrative order should be issued unless it is supported by "substantial evidence." Evidence is "substantial" if it is the kind of evidence a reasonable mind might accept as adequate to support a conclusion. Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, 477 (1951); Ellers v. Railroad Retirement Board, 132 F. 2d 636 (2 Cir. 1943); National Labor Relations Board v. Remington Rand, 94 F. 2d 862 (2 Cir. 1938), *cert. denied*, 304 U. S. 576, 585 (1938), *rehearing denied*, 304 U. S. 590 (1938).

We cannot, as defendants seem to urge, consider the presumption in the Longshoremen's Act,[3] as having here

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[3] Sec. 920. Presumptions.

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

* * *

the quality of independent affirmative evidence. We believe that plaintiffs offered sufficient proof to rebut that presumption and consequently it must fall out of the case. It cannot be weighed with defendants' evidence against plaintiffs' since "(i)t's only office is to control the result where there is an entire lack of competent evidence." Del Vecchio v. Bowers, 296 U. S. 280, 286 (1935).

After examining the record as a whole we must affirm the decision below. Perhaps this is not the result we would have reached had the case come before us *de novo*, but that is unimportant. Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, 488 (1951). Deceased told his wife that he was injured while standing on a lighter pulling a line under orders from a superior, and his statements to others were consistent therewith. The statement by Kinnally corroborates deceased's declarations. Additional corroboration, though perhaps to a lesser degree, can be found in the testimony of Rose D'Ornellas that deceased came home sick on the day of the alleged incident, Associated General Contractors v. Cardillo, 106 F. 2d 327 (D. C. Cir. 1939), and in the testimony of George Lucas that it was not unusual to have a stevedore aboard a lighter pulling a barge. On all the evidence we cannot say that the Deputy Commissioner committed error. Associated General Contractors v. Cardillo, supra; cf. Ellers v. Railroad Retirement Board, 132 F. 2d 636 (2 Cir. 1943); National Labor Relations Board v. Service Wood Heel Co., 124 F. 2d 470 (1 Cir. 1942).

Affirmed.

Opinion of United States District Court for the Southern District of New York

RYAN, *J.*

The Government has moved for summary judgment (Rule 56) in this suit filed by John W. McGrath Corporation and the Fidelity & Casualty Company of New York to review and set aside a compensation order and award made under the provisions of the Federal Longshoremen's and Harbor Workers' Compensation Act (33 USCA 901 et seq.) to Rose D'Ornellas, widow of John D'Ornellas, a deceased employee of the McGrath Corporation.

The award was made upon the claim "that John D'Ornellas, the deceased, in the course of his employment as a sweeper and longshoreman for the John W. McGrath Company, on or about January 14, 1955 while engaged in work for that company, suffered a coronary occlusion with myocardial infarction, and that as a result of that accident he died on March 5, 1955."

It is not in dispute that D'Ornellas was in the employ of the McGrath corporation on January 14, 1955; that on Monday, January 17, 1955 at about 10 A. M. he was taken by ambulance from this employment at Pier 9, North River to the Beekman Downtown Hospital, that he remained there as a patient until February 12, 1955, that he was found to have suffered a coronary occlusion secondary to coronary thrombosis and that he died on March 5, 1955.

It also appears of record that D'Ornellas on February 15, 1955 filed an employee's claim for compensation stating that he had sustained an injury to his chest and heart during the course of his employment at 3 p. m. on January 14, 1955 which was caused by "pulling a lighter by line by himself, felt severe pain in chest."

The causal relation between the incident claimed and the ensuing disability and death was questioned by the employer and insurer. There is ample medical testimony to support the finding of a chain of causation between a strain

or strenuous exertion and an exacerbation of the coronary ailment to which the deceased unquestionably succumbed.

But the employer and insurer also disputed the happening of the alleged causative incident, and now urge that the evidence was insufficient to support a finding of its occurrence because the only evidence of the happening of the incident was claimed are the hearsay declarations of the deceased employee, which stand uncorroborated by other evidence.

Section 23 of the Longshoremen's Act (33 USCA 923(a)) provides for the receipt of proof beyond the limitations set by "common law or statutory rules of evidence or by technical or formal rules of procedure." Thus, hearsay evidence, so called, was admissible before the Commissioner at the hearing of the claim and the character of this proof affected only the weight to be given it. The Commission accepted the declarations of the deceased employe as truthful statements of what did in fact befall him and based the award on such a finding; herein, it is claimed lies error, for it is contended that these statements of the deceased are not corroborated by other evidence, as the statute requires (Sec. 23 of the Longshoremen's Act, Sec. 923(b)).

We have examined and considered the record as a whole. *O'Leary* v. *Brown-Pacific Maxon*, 340 U. S. 540 (1951). We hold following *Associated General Contractors* v. *Cardillo*, 106 F. 2d 327, 329 (C. A. D. C. 1939) that "Whatever tends to make a story substantially more credible or probable corroborates it." Although as tersely stated in *Matter of Altschuller* v. *Bressler* (1943), 289 N. Y. 463, 469, the problem is whether there is a sufficient "residuum of legal evidence," it is not "required that such residuum should, independently of the 'hearsay' evidence establish the accident."

Appendix A—Opinion of United States District Court for the Southern District of New York

The record reveals that Rose D'Ornellas, the widow of the deceased, testified that on either January 13 or 14, 1955 her husband came home from work looking tired and sick, that he complained to her that "he was sent to work on a lighter, and he had objection to that. He was a maintenance man" * * * "that he was pulling the lighter * * * some kind of lines he was pulling, and he felt a pain in his chest;" that she was a practical nurse working in a city hospital, that she gave him medication, that she did not go to work for the next two days (Saturday and Sunday) but stayed at home and nursed him until he returned to work on Monday, January 17, 1955 (the day on which he was taken from the job to the hospital).

There is also the testimony of Dr. Meyer Texon, an internist and cardiac specialist who at the request of the employer examined D'Ornellas at the Beekman Downtown Hospital on January 22, 1957. Dr. Texon testified that the deceased had told him that "on Thursday, January 13, 1955 about 2 p. m., I was pulling a rope to help move a barge around the pier. While pulling and working I felt a severe pain around my upper front chest. I stopped working and rested about 10 minutes until the pain subsided * * *."

We must remember that the deceased had made the same statement in his claim filed on February 15, 1955.

As corroboration of the truthfulness of these statements of the deceased, there is

1. The fact that his wife, a woman of several years practical nursing experience, observed his physical condition when the deceased came home from work on the day of the incident; that he was in fact ill and required nursing for the two following days.

2. The fact that Dr. Texon in his report to the employer dated January 28, 1955 made no specific adverse observation when he wrote:

"The first complaint with respect to the heart appears to have occurred on Thursday, January 13, 1955, while the patient was exerting considerable effort in the course of his work which required pulling a rope in order to move a barge around the pier."

The Doctor apparently found no cause or occasion to question the truthfulness of the deceased's statement as to the incident of January 14, 1957.

3. The fact that the dock boss for the McGrath Corporation—one Edward Kinnally who died before the hearings—had signed a statement that it had been reported to him by one of the workmen that the deceased had had a heart attack on a lighter on Pier 9 while he was hauling on a line at Pier 9 on January 14, 1955.

A reading of the entire record leaves the impression that the award is just and fair under the law. There is sufficient evidence of circumstances surrounding the several separate statements of the deceased to lend the required corroborative support to them; there is the other evidence to which we have referred which affords further corroboration. The circumstances under which the declarations were here made and the other evidence was ample to support an inference that the incident occurred when, where and as the deceased stated.

Motion granted; complaint dismissed; settle order.

SYLVESTER J. RYAN,
USDJ.

10/16/57

APPENDIX B

Constitution and Statutes Involved

(a) Constitution of the United States Amendment V:

"No person shall be held to answer for a capital, or other infamous crime * * *; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; * * * nor be deprived of life, liberty, or property, without due process of law; * * *."

(b) The Longshoremen's Act [44 Stat. 1424 (1927)] as codified in Title 33, United States Code:

"SECTION 902. Definitions

When used in this chapter—

* * *

(2) The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment."

"SECTION 903. Coverage.

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State Law * * *."

"SECTION 919. Procedure in respect of claims.

* * *

(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect to the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and

other interested parties by registered mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

(d) At such hearing the claimant and the employer may each present evidence in respect of such claim and may be represented by any person authorized in writing for such purpose."

"SECTION 920. Presumption

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another."

"SECTION 921. Review of compensation orders

(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District).

The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States * * *."

"SECTION 923. Procedure before the deputy commissioner

(a) In making an investigation or inquiry or conducting a hearing the deputy commissioner shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury."

(c) The Administrative Procedures Act [60 Stat. 238 (1946)] as codified in Title 5, United States Code:

"SECTION 1001. Definitions.

As used in this chapter—

(a) 'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia; * * *

* * * *

(b) 'Person' includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. 'Party' includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes."

"SECTION 1004. Adjudications.

In every case of adjudication required by statute to be determined after opportunity for an agency hearing, * * *

* * * *

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title."

"SECTION 1006. Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision.

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

(a) • • •

(b) • • •

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

"SECTION 1009. Judicial review of agency action.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

• • •

(e) So far as necessary to decision and were presented the reviewing court shall decide all relevant questions of

law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any part, and due account shall be taken of the rule of prejudicial error." * * *

"SECTION 1011. Impairment of rights; effect on other laws; separability; subsequent legislation; effective date.

Nothing in this chapter shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this chapter or the application thereof is held invalid, the remainder of this chapter or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this chapter through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly. This chapter shall take effect three months after its approval except that sections 1006 and 1007 of this title shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 1010 of this title shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement." * * *

APPENDIX C

Legislative History of Substantial Evidence Test in the Administrative Procedures Act

The bill for an Administrative Procedures Act (S. 7) was introduced in the Senate at the 79th Congress, First Session.

The second sentence of Section 7(c) of that bill as introduced on the floor of the Senate should be compared with 5 United States Code Section 1006(c). This Section 7(c) provided:

> "Any evidence, oral or documentary, may be received, but every agency shall as a matter of policy provide for the exclusion of immaterial and unduly repetitious evidence and no sanction shall be imposed or rule be issued except as supported by relevant, reliable and probative evidence."

This sentence was commented on in the Senate Report * in the following language:

> "The second and primary sentence of the subsection is framed on the theory that an administrative hearing is to be compared with an equity proceeding in the courts. The mere admission of evidence is not to be taken as prejudicial error (there being no lay jury to be protected from improper influence) although irrelevant and unduly repetitious evidence is to be excluded as a matter of efficiency and good practice; and no finding or conclusion may be entered except upon evidence which is plainly of the requisite materiality and competence; that is 'relevant, reliable and probative evidence'. Thus while the exclusionary 'rules of evidence' do not apply except as the agency may as a matter of good practice simplify the hearing and record by excluding obviously improper or unnecessary evidence, the standards and principles of probity and reliability of evi-

* S. Rept. No. 752 (79th Cong., 1st Sess.).

> dence must be the same as those prevailing in courts of law or equity in non-administrative cases. There are no real rules of probity and reliability even in courts of law, but there are certain standards and principles—usually applied tacitly and resting mainly upon common sense—which people engaged in the conduct of responsible affairs instinctively understand and act upon. They may vary with the circumstances and kind of case, but they exist and must be rationally applied. These principles under this subsection are to govern in administrative proceedings." (S. Rept. No. 752, supra, p. 22.)

Section 10(e) of the Senate bill as introduced on the floor of the Senate should be compared with 5 United States Code Section 1009(e). This Section 10(e) provided by its second and third sentences that the reviewing court shall:

> "(B) hold unlawful and set aside agency action findings and conclusions found to be * * * (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by state * * *. In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by the parties, and due account shall be taken of the rule of prejudicial error."

The Senate Report commented on the above language of Section 10 as follows:

> "* * * 'Substantial evidence' means evidence which on the whole record is clearly substantial, sufficient to support a finding or conclusion under 7(e) and material to the issues." (S. Rept. No. 752, supra, p. 28.)

Senator McCarran, Chairman of the Senate Committee of the Judiciary explained the meaning of the "substantial evidence" test proposed in that bill on the floor of the Senate in answering questions of his fellow Senators:

"Mr. Ferguson: Would the Senator then say that the judgment or decision of the agency must be based upon stronger proof than a scintilla of evidence?

"Mr. McCarran: Very much stronger.

"Mr. Ferguson: The old rule which applied in the courts, particularly on certiorari, was that if there was any evidence to sustain the verdict or judgment, it should be sustained. The courts have many times so held. The Senator would say, would he not, that something more than 'any evidence' is required to sustain such a decision.

"Mr. McCarran: The answer is in the affirmative. We say the evidence must be substantial probative evidence.

"Mr. Ferguson: So we are changing the rule which has been applied in the past that any evidence, or a scintilla of evidence, as it is sometimes defined, is sufficient to sustain a verdict or judgment.

"Mr. McCarran: We tried as best we could to establish a guide for administrative groups so that they would apply the rule in such a way that there would be a substantial probative evidence behind their findings, and so that they could say 'We are not afraid to have our findings reviewed by a court'.

"Mr. George: Mr. President, will the Senator yield?

"Mr. McCarran: I yield.

"Mr. George: The courts have many times held that if there is any evidence to sustain the finding of an administrative board under the statute, the courts have no power to intervene. If this bill should become a law would that rule, as heretofore construed by the courts, remain in effect?

"Mr. McCarran: The courts have given various constructions. The courts in reviewing an order, are governed by the provisions of section 10(e), which states the substantial-evidence rule. In other words, in some instances the courts have held that there must be substantial evidence. We are saying that there must be probative evidence of a substan-

tial nature, and that even though the commission or bureau may take hearsay evidence in its hearings, it must have some probative evidence to sustain its finding.

"Mr. George: The point I wish to raise is that some of the acts of Congress, particularly those enacted in recent years, have led the courts to hold—and they so hold—that if there be any evidence to sustain the finding of a board or agency, the court has no power to interfere with it.

"Mr. McCarran: I would put it in this way.

"Mr. George: Would the enactment of this bill require some substantial or probative evidence to support such a finding?

"Mr. McCarran: Yes." (92 Cong. Rec. 2157-2158).

This bill passed the Senate without modification of the language of Sections 7(c) and 10(e) hereinabove quoted (92 Cong. Rec. 2164-2167).

The House Judiciary Committee reported out * the Senate bill (S. 7) at the Second Session of the 79th Congress. It made no significant amendment to the quoted language but amended the language of the second sentence of Section 7(c) so that it provided:

> "Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence and no sanction shall be imposed or rule or order issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable probative and substantial evidence."

The language quoted immediately above is presently found in 5 United States Code Section 1006(c).

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* H. Rept. 1980 (79th Cong., 2nd Sess.).

Appendix C—Legislative History of Substantial Evidence Test in the Administrative Procedures Act

The comments of the House Judiciary Committee upon the second sentence of Section 7(c) of the bill as amended * are almost identical with those in the Senate Report. Its comments on the "substantial evidence" test of Section 10(e) of the bill were far more illuminating than those in the Senate Report. The House Report declared:

> "'Substantial evidence' means evidence which on the whole record is clearly substantial, plainly sufficient to support a finding or conclusion under the requirements of section 7(c), and material to the issues. It is exceedingly important. Difficulty has come about by the practice of agencies and courts to rely upon something less—suspicion, surmise, implications or plainly incredible evidence. Although the agency must do so in the first instance, under this bill it will be the duty of the courts to determine in the final analysis and in the exercise of its independent judgment whether on the whole of the proofs brought to their attention the evidence in a given instance is sufficiently substantial to support a finding, conclusion or other agency action or inaction. In reviewing a case under this fifth category the court must base its judgment upon its own review of the entire record or so much thereof as may be cited by any party." (H. Rept. No. 1980 supra p. 45.)

In introducing the bill on the floor of the House, Representative Walter, Chairman of Subcommittee on Administrative Law of the House Judiciary Committee explained the effect of Section 7(c) of the bill as follows:

> "The requirement that agencies may act only upon relevant probative and substantial evidence means that the accepted standards of proof, as distinguished from the mere admissibility of evidence, are to govern in administrative proceedings as they do in courts of law and equity. The same provision contains two other limitations—first, that the agency

* See H. Rept. 1980, *supra*, page 36.

must examine and consider the whole of the evidence relevant to any issue and secondly, that it must decide in accordance with the evidence. Under these provisions the function of an administrative agency is clearly not to decide arbitrarily, or to act contrary to the evidence or upon surmise or suspicion or untenable inference. Mere uncorroborated hearsay or rumor does not constitute substantial evidence—See *Edison Co.* v. *Labor Board* (305 U. S. 197, 230). Under this section agencies are not authorized to decide in accordance with preconceived ideas or merely to sustain or vindicate prior administrative action, but they must enter upon a bona fide consideration of the record with a view to reaching a just decision upon the wole of it." (92 Cong. Rec. 5653.)

He described Section 10(e) of the bill in similar vein:

"The term 'substantial evidence' as used in this bill means evidence which upon the whole record as reviewed by the court and in the exercise of the independent judgment of the reviewing court is material to the issues, clearly substantial, and plainly sufficient to support a finding or conclusion affirmative or negative in form under the requirements of section 7(c) heretofore discussed. Under this section the function of the court is not merely to search the record to see if it is barren of any vestige of reliable and probative evidence, or supports the agency action by a scintilla or mere hearsay, rumor, suspicion, speculation and inference—cf. *Edison Co.* v. *Labor Board* (305 U. S. 197, 229-230). Under this bill it will not be sufficient for the court to find, as the late Chief Justice Stone pointed out within the year, merely that there is some 'tenuous support of evidence'—*Bridges* v. *Wixon* (326 U. S. at 178). Nor may the bill be construed as permitting courts to accept the judgments of agencies upon unbelievable or incredible evidence." (92 Cong. Rec. 5654, 5655.)

While the bill was being considered on the floor of the House, various other members of the House Judiciary Committee made comments on the bill. Representative Gwynne stated that the bill adopted the rule that administrative

findings must be supported by substantial evidence as opposed to a scintilla of evidence (92 Cong. Rec. 5656) and Representative Springer and Robison said the same thing in somewhat different words (92 Cong. Rec. 5657, 5659).

One member of the House who was not a member of the House Judiciary Committee, Representative Russell of Texas, expressed his concern that the language "Except as otherwise expressly provided by statute" (which introduced the first sentence of Section 7(c) of the bill) would somehow be applied to modify second sentence thereof so as to preserve dictatorial powers of an agency on the basis of the slightest evidence (92 Cong. Rec. 5660). The House Record continues:

> "Mr. Russell: When an agency has such an authorization, which under the authorization is the law, then this act is exempting that agency from a judicial review or a passing upon that evidence, regardless of the kind of evidence it may be.
>
> "Mr. Walter: Mr. Chairman, will the gentlemen yield?
>
> "Mr. Russell: I am glad to yield to the gentlemen.
>
> "Mr. Walter: The gentlemen is not seriously contending that an agency decision based upon a mere scintila of evidence would hold up?
>
> "Mr. Russell: If the law has made it such, it will hold up under the very phrase I have just read. That is what I am afraid of.
>
> "Mr. Walter: Well, the measure now under consideration is designed to prevent that sort of thing, and will prevent it" (92 Cong. Rec. 5661).

Thereafter the committee amendment to the Senate bill for an Administrative Procedures Act (S. 7) was read (92 Cong. Rec. 5664-5666). Thereafter without any further amendment worthy of note, the bill passed the House (92 Cong. Rec. 5668), and the Senate (92 Cong. Rec. 5791), and became law.*

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* 60 Stat. 238 (1946).